

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JUNE 12 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2007-0359-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
GENARO PRECIADO-VEGA, SR.,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-62116

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Genaro Preciado-Vega, Sr.

Tucson
In Propria Persona

V Á S Q U E Z, Judge.

¶1 Following a jury trial, petitioner Genaro Preciado-Vega was convicted of first-degree burglary and first-degree murder. The trial court imposed a 10.5-year prison term for the burglary conviction, to be served concurrently with a lifetime term without the

possibility of release for twenty-five years for the murder conviction. We affirmed Preciado-Vega's convictions and sentences on appeal and clarified the terms of his life sentence and his community supervision. *State v. Preciado-Vega*, No. 2 CA-CR 01-0076 (memorandum decision filed Jan. 22, 2002). After appointed counsel notified the court she was unable to find any issues to raise in a post-conviction petition, the trial court granted Preciado-Vega leave to file a significantly delayed pro se petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The trial court summarily denied relief, and this petition for review followed. We will not disturb a trial court's denial of post-conviction relief absent a clear abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶2 Preciado-Vega argues that trial counsel was ineffective for failing to permit him to decide whether to accept or reject the state's plea offer of second-degree murder with a sentence cap of twenty-two years. However, as the trial court correctly noted denying Preciado-Vega's petition, there was no evidence a plea offer existed. The court found:

[T]he State claims that [Preciado-Vega] was never offered a plea agreement. There is evidence that the prosecutor *discussed* a plea agreement with [Preciado-Vega's] trial attorney prior to both the first and second trials. However, there is no evidence in the record that a plea was ever actually offered. It appears that the homicide panel and the victim's family objected to a plea being offered in the first trial and the victim's family was unavailable to consent to a plea agreement in the second trial.

¶3 In order to state a colorable claim of ineffective assistance, a defendant must establish both that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance caused prejudice to the defense. *Strickland v.*

Washington, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). The only evidence regarding a plea agreement was two letters from the county attorney, one before the first trial and the other before the second, respectively stating that “there will be no plea offers in this case” and that the county attorney had been unable to contact the victim’s parents to discuss a plea offer, so “we need to be prepared to try the case.” In his petition for review, Preciado-Vega acknowledges that he “does not have, nor is he aware of any means to obtain, proof of [a plea] offer.” Because there was no evidence that a plea offer existed, the trial court did not abuse its discretion by concluding that counsel “could not have been ineffective for failing to communicate or by not permitting [Preciado-Vega] to accept a plea agreement that did not exist.”

¶4 Accordingly, although we grant the petition for review, we deny relief.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

JOSEPH W. HOWARD, Judge